



IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 77-85

J. L. SMALLING, SUPERINTENDENT OF UNIFIED SCHOOL DISTRICT No. 480, SEWARD COUNTY, KANSAS, and Jo ANN SHARP, AL SHANK, DON AVEY, ROBERT CARLILE, GEORGE ROSEL, WAYNE ROSS and W. L. SEBRING, MEMBERS OF THE BOARD OF EDUCATION OF UNIFIED SCHOOL DISTRICT No. 480, SEWARD COUNTY, KANSAS, Petitioners,

v.

LILA EPPERSON and OLETA A. PETERS, Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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v.

LILA EPPERSON and OLETA A. PETERS, *Respondents*.

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Respondents believe that there is no issue properly preserved worthy of consideration by this Court.

1. The only significant issue urged by petitioners is that contained in their first question presented: whether the Fourteenth Amendment itself creates a cause of action for damages against those who are not "persons" within the meaning at 42 U.S.C. § 1983 and

are thus not subject to the cause of action created by the statute. The Court recognized this issue to be an important one, which it did not decide, in *Mt. Healthy City School District v. Doyle*, 45 U.S. Law Week 4079, 4080 (Jan. 11, 1977).¹ But the issue is not properly before this Court, for it was not raised by petitioner in the court below and was not considered by the court below.

In the instant case, respondents asserted a cause of action under the Fourteenth Amendment, and the district court, finding "the *Bivins* rationale" applicable, held "that a Fourteenth Amendment cause of action [can] be maintained without regard to § 1983, where the jurisdictional amount satisfies the requirements of 28 U.S.C. § 1331." Proceeding to the merits, the district court ruled that respondents—two teachers in a public school system—had been denied procedural due process, because they enjoyed a property interest in continued employment and were denied renewal of their employment without a hearing. Despite these rulings, however, the court entered judgment in favor of petitioners (the school authorities sued in their official capacities), concluding that there was no relief which could be awarded respondents. The court deemed reinstatement an inappropriate remedy for the violation found, and believed that the Eleventh Amendment

¹ "The question of . . . whether as respondent urged in oral argument, we should, by analogy to our decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), imply a cause of action directly from the Fourteenth Amendment which would not be subject to the limitations contained in § 1983, is one which has never been decided by this Court. Counsel for respondent at oral argument suggested that it is an extremely important question and one which should not be decided on this record. We agree." *Ibid.*

precluded any monetary award against petitioners in their official capacities (as the award would be payable from the School District's treasury).

Respondents appealed, contending that the district court had erred on both remedial questions. Petitioners filed a responsive brief in which they advanced the following arguments in support of the district court's judgment in their favor: that respondents did not possess a property interest entitling them to procedural due process; that respondents had waived whatever claim they might otherwise have had to a hearing on their non-renewal; that the district court had correctly concluded that reinstatement was an inappropriate remedy; and that the district court had correctly ruled that the Eleventh Amendment precluded a monetary award. *Petitioners' brief below did not challenge the district court's holding under the Fourteenth Amendment, and neither side discussed that issue in its brief.*

The court below reversed, and remanded the case for further proceedings, upholding respondents' argument that the Eleventh Amendment did not preclude a monetary award against the school district's treasury.² *The court below did not address the propriety of the district court's ruling that respondents had asserted a proper cause of action under the Fourteenth Amendment.*

Petitioners thus ask this Court to grant certiorari at an interlocutory stage of this litigation to decide

² Applying the standards enunciated by this Court in *Mt. Healthy, supra*, 45 U.S. Law Week at 4081, the court below concluded that school districts in Kansas are not the "State" for Eleventh Amendment purposes.

an issue which they did not present to the court below, and which that court neither considered nor decided. In the procedural posture of this case, that issue does not meet any of the criteria of this Court's Rule 19(1)(b), and this Court should not consider it. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975); *Ramsey v. Mine Workers*, 401 U.S. 302, 312 (1971). See also *Mt. Healthy, supra*, 45 U.S. Law Week at 4080-81.

2. The remaining questions presented in the petition are manifestly not worthy of this Court's attention. We note only that the second question, like the first discussed above, was neither presented to nor considered by the court below.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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